85-1600

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, et al.,

Petitioners,

v.

AL FRIEDMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Does a county's use of a seal depicting the county's historical and cultural heritage violate the Establishment Clause because the seal includes, among other symbols, a Latin cross and a Spanish motto translated "With This We Conquer"?

LIST OF PARTIES

The Board of County Commissioners of Bernalillo County, David Santillanes, Chairman, Juven Sanchez, Robert Hawk, Wray Simmons, E.R. (Corky) Morris, members, were the Defendants-Appellees in the United States Court of Appeals for the Tenth Circuit.

Al Friedman was the Plaintiff-Appellant in the United States Court of Appeals for the Tenth Circuit.[1]

The Rutherford Institute and the American Jewish Congress filed Brief Amici Curiae with the Tenth Circuit Court of Appeals.

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[1]Herald James Johnson was named as a Plaintiff in the complaint filed in this case in the United States District Court for the District of New Mexico, along with Plaintiff Al Friedman. However, Johnson never appeared at the hearing in the district court and was not a party to the Tenth Circuit appeal. *Johnson v. Board of County Commissioners of Bernalillo County*, 828 F. Supp. 919, 921 (D.N.M. 1981), [App. 43a].

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINIONS BELOW

The opinion of which review is sought is reported as *Friedman v. Board of County Commissioners of Bernalillo County,* 781 F.2d 777 (10th Cir. 1985) (opinion on rehearing *en banc*), appearing at pages 1a-17a of the Appendix. The judgment of that court, dated December 26, 1985, appears at page 53a of the Appendix. The district court's order on remand from the rehearing *en banc,* en-

joining further use of the Bernalillo County seal in its present form, appears at page 55a of the Appendix. The decision of the panel of the United States Court of Appeals for the Tenth Circuit is not separately published, but is reported as an appendix to the published opinion on rehearing *en banc*, 781 F.2d at 786, and at pages 18a-39a of the Appendix. The Memorandum Decision and Order of the District Court, reported as *Johnson v. Board of County Commissioners of Bernalillo County*, 528 F. Supp. 919 (D.N.M. 1981), appears at pages 40a-52a of the Appendix.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit rendered judgment against Petitioners on December 26, 1985 on rehearing *en banc*. The mandate issued on January 17, 1986.[2]

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action is based on the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment to the United States

[2]A motion to recall the mandate and to stay its reissuance pending application for certiorari was filed by Petitioners in the Tenth Circuit on March 14, 1986.

Constitution.[3] The First Amendment provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

Suit was brought pursuant to 42 U.S.C. Section 1983 (1982), which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[4]

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[3]Respondent also brought a pendant state claim, asserting that his rights, under Article II, section 11 of the New Mexico Constitution, were violated. This section provides that:

> Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.

The district court found that the state constitutional claim was properly joined under the doctrine of pendant jurisdiction, but implicitly rejected it when the court upheld the County's use of the seal. [App. 41a.] The Tenth Circuit panel expressly held that the county seal did not violate the New Mexico Constitution. [App. 33a.] However, the Tenth Circuit, *en banc*, found the Establishment Clause dispositive and did not reach the state constitutional claim. [App. 5a.] Thus, the state constitutional claim is not properly before this Court.

[4]Jurisdiction in the United States District Court for the District of New Mexico was based on 28 U.S.C. Sections 1343(3) and (4) and 28 U.S.C. Sections 2201 and 2202.

STATEMENT OF THE CASE

I. FACTS AND BACKGROUND

This case concerns the constitutionality of Bernalillo County's use of its official seal under the Establishment Clause of the First Amendment. The Bernalillo County seal has been in use by the County since 1925, and contains the words "Bernalillo County" and "State of New Mexico" around its outer edge.[5] [App. 3a.] Within this border appears the words "Con Esta Vencemos" against a background depicting the sky. In English, this motto means "With This We Conquer" or "With This We Overcome." [App. 3a.] Below these words is a Latin cross[6] centered over four blue mountains. Beneath the mountains appears a green plain, against which eight sheep are imposed. [App. 41a.] Color photographs of the seal appear at pages 12a and 13a of the Appendix.

The origin of the Bernalillo County seal is unclear, but it is uncontradicted that it has been in official use since at least 1925 to designate certain official county documents. [App. 3a, 41a-42a.][7] Since 1973, the seal has

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[5]Each county board is required by state law to have and use a seal. N.M. Stat. Ann. 4-38-12 (1984).

[6]The particular form of cross, acccording to expert heraldry witness, Mr. Henry Beckwith, is known as a cross botonnee, referring to the three buttons at the end of each arm of the cross. [App. 46a-47a.] The cross is also referred to as a Latin cross because of the placement of the horizontal bar more towards the top of the cross. [App. 3a].

[7]Ramona Montoya, Bernalillo County Clerk from 1945-1956, testified that the stamp, used to impress the seal on documents, had to be repaired during her tenure in office: once because the seal had been dropped and broken, and once because it was so worn that the imprint was illegible. Tr. pages 151-52, Hearing of November 12, 1981.

been displayed on all county documents, stationery, motor vehicles, and the shoulder patches of members of the county sheriff's department.[8] [App. 3a.]

The seal symbolizes the historic importance of the role played by Spanish Catholicism in the development of New Mexico and, more particularly, Bernalillo County. [App. 49a.] Over 400 years ago, in 1539, the first Catholic friar, Marcos de Niza, entered and began exploring the New Mexico territory, including Bernalillo County. [App. 45a.] Francisco Vasquez Coronado followed. Two priests traveling with Coronado, Friars Escalante and Padilla, remained in the area now known as Bernalillo County and were later killed by hostile Pueblo Indians. [App. 45a-46a.] In 1581, a party of clerics, including Fray Augustine Rodriguez and Friars Lopez and Santa Maria, were sent to search for Escalante and Padilla and met the same fate. [App. 46a.] Finally, in 1598, after the advent of the Onate Expedition, farming became the principle activity of Bernalillo County, and missions were established at Sandia Pueblo (1610) and Isleta Pueblo (1612). [App. 46a.] "Once permanent settlements were established, the Catholic missionaries played a singular role in keeping the Spanish colonists physically and spiritually alive." [App. 46a.]

In 1680, the Spanish first introduced sheep in the New Mexico territory. [App. 45a.] By the mid-1800's, Bernalillo County had the oldest and most intensive sheep

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[8]Acccording to the testimony, county officials expanded the use of the seal in 1973 to identify Bernalillo County as a distinct governmental entity, separate and apart from the City of Albuquerque. [App. 3a.]

raising industry in the United States. [App. 45a.] Reports compiled by the United States government reveal that by 1890, Bernalillo County supported some 800,000 sheep and produced approximately two million pounds of wool. [App. 45a.]

In addition to its role in the development of Bernalillo County, the impact of the Spanish and Catholic explorers and settlers is found throughout the state of New Mexico. The capital city of New Mexico is "Santa Fe," which translates "The City Of The Holy Faith." The Sangre de Cristo mountains located in northern New Mexico were named for "The Blood of Christ." [App. 49a.] The City of Las Cruces translates "The Crosses" and has three crosses on its seal.[9] [Tr. at 250.]

No citizen objected to the county seal until 1980 when the Respondent, a self-professed "atheist" and "ethnic Jew" brought an action for declaratory and injunctive relief in the Federal District Court for the District of New Mexico, seeking to prevent the Petitioners from displaying the seal or appropriating funds for its display. [App. 40a, 52a.] Respondent argued that the seal constitutes an instrument propagating religion, specifically the Christian faith, and is therefore violative of the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution and Article II, section 11 of the New Mexico Constitution.[10] [App. 40a-41a.]

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[9]An illustration of the City of Las Cruces' seal appears on the Chart following Conclusion.

[10]See footnote 3, for the wording of the New Mexico constitutional provision.

II. DECISIONS BELOW

A. The District Court Decision

After a full hearing on the merits, the district court held:

> Under the Establishment Clause and the Free Exercise Clause, the Court finds that the Bernalillo County seal passes Constitutional muster. In this Court's view, the seal is more of a historical symbol than a religious expression. Therefore, it would be palatably [sic] unreasonable to require the removal of the passive and benign symbols of the cross and the motto from the seal.

[App. 52a]

1. Establishment Clause

The district court applied the three-prong test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971),[11] to determine whether the seal violated the First Amendment, and concluded that no such violation existed.

Examining the Bernalillo County seal under the first prong or "purpose" test, the court found, based on the testimony of expert witnesses, that the seal served a secular legislative purpose.[12] [App. 49a.]

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[11]First, the [action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [action] must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

[12]Mr. Byron A. Johnson, the Curator of History with the Albuquerque Museum and an expert in the history and culture of Bernalillo County, testified to the historical role played by

(Continued on following page)

> The Court finds that the purpose of the Bernalillo County seal, in its present form, is to authenticate official documents, authenticate official communications, and to facilitate identification of County property and personnel of the County Sheriff's office. Simultaneously, it is used to promote the appreciation of the heritage, history and cultural pride of Bernalillo County.

[App. 49a-50a.]

Before going into its analysis under the second prong or "effect" test, the district court first pointed out that "[t]he First Amendment does not require that the prerogatives of government be limited by the sensibilities of its most sensitive or fastidious citizens." [App. 5a.] Therefore, despite the effect the seal had on the Repondent, or some other sensitive perceiver, the court viewed:

> the cross and the motto on the seal as having only a benign reference to religion and having no principal or primary effect that advances or inhibits religion. The Court views the seal an an iconographic illustration of the rich cultural heritage of Bernalillo County.

[App. 50a.]

Under the third prong or "entanglement" test, the district court found that any expenditures to display the

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the Spanish and the Church in the development of Bernalillo County. Moreover, he testified that the seal could only be understood with reference to history. Mr. Henry Beckwith, an expert in heraldry or the meaning of historical symbolism, also testified that the seal symbolizes the Spanish heritage of New Mexico and the sheep raising industry of the region. Dr. Charles Polzer, a Jesuit priest and ethno-historian from the University of Arizona, testified that the sheep in the seal did not represent religious symbols, as such symbols are typically accompanied by a "life form" [shepherd] which was absent from the Bernalillo County seal. [App. 46a-47a.]

cross and motto were minimal. [App. 51a.] Moreover, the display of the cross and motto did not benefit any religious group, nor did the display of the cross and motto reflect a relationship between the County and any religious authority. Finally, the court concluded that the display of the cross and motto did not create a divisive potential among any religious and non-religious groups. [App. 51a-52a.]

2. Free Exercise Clause

The district court correctly noted that "individual preferences, as sincere as they may be, cannot be the constitutional standard." [App. 52a.] Moreover, the Respondent may have believed that the display of the cross and motto infringed upon his rights, but he did not articulate "how the symbolism of the cross and the motto, as perceived by him, affected his right to believe or not to believe in a deity or how it affected his ethnicity." [App. 52a.] Thus, Respondent was unable to prove his Free Exercise claim.

B. The Tenth Circuit Panel Decision

Respondent appealed the Case to the United States Court of Appeals for the Tenth Circuit, which affirmed the decision of the district court, holding that "the seal, as used in the circumstances of this case, does not violate the federal or state constitutional provisions . . . ."[13] [App. 19a.]

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[13]Although the district court opinion was silent on the state constitutional claim, the appellate panel discussed and ruled

(Continued on following page)

> Considering the circumstances of the use of the seal as a whole, we conclude that the trial court's finding that the seal as used has a permissible secular purpose is not clearly erroneous.

[App. 25a.]

The court reasoned that the Establishment Clause does not prohibit all reference to objects of religious significance, and the historic elements in the seal—the cross, the sheep, and the mountains—all represented the county's settlement and development. [App. 25a.]

Although the court noted that the question of the effect of the seal was a troubling one, it relied on this Court's holding in *Lynch v. Donnelly*, 465 U.S. 668 (1984), to conclude that the principal or primary effect of the seal's use did not violate the Establishment Clause. [App. 27a-28a.] Finally, the Court agreed with the district court's holding that the seal did not engender an excessive entanglement of government with religion. [App. 28a-29a.]

The Respondent filed a petition for rehearing and suggestion for rehearing *en banc* with the Tenth Circuit. The rehearing *en banc* was granted on February 5, 1985.

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on the claim based on Article II, Section 11 of the New Mexico Constitution. [App. 32a.] After examining New Mexico cases construing the provision, the Tenth Circuit concluded that it has the same purposes as the First Amendment to the United States Constitution. [App. 32a.] Thus, the state constitutional challenge was defeated by the same reasoning as the court applied to the First Amendment claims. See footnote 3, *supra*, for the wording of the New Mexico constitutional provision.

C. The Tenth Circuit En Banc Decision

The Tenth Circuit, sitting *en banc,* vacated the opinion of the panel and reversed the trial court, holding that the display of the cross and motto on the seal violated the Establishment Clause of the First Amendment. The court found the Establishment Clause issue dispositive, and concluded that it was not necessary to reach either the Free Exercise claim or the state constitutional claim.

The Tenth Circuit reviewed the district court's findings and held that the trial court had erroneously concluded that there was no violation of the "effect" test.[14] [App. 7a.] The court did not expressly reject "the district court's findings of an adequate secular purpose and of no excessive entanglement," but noted that "all courts must be wary of accepting after-the-fact justifications by government officials in lieu of genuinely considered and recorded reasons for actions challenged on Establishment Clause grounds." [App. 7a, n.3.] Rather, the court "must be vigilant to distinguish between sham and sincere purposes." [App. 7a, n.3.]

The court found that "the seal as used conveys a strong impression to the average observer that Christianity is being endorsed." [App. 9a.] The court reasoned that not only did the cross symbolize Catholicism and Christianity, but also the motto could be interpreted to mean "With This [The Cross] We Conquer." Despite

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[14]The Court noted that the precise standard of review for constitutional facts is unclear. However, the Court stated it would have reversed the district court under either the clearly erroneous standard or under the erroneous as a matter of law standard. [App. 5a, n.2.]

expert testimony establishing that the sheep symbolized the importance of the sheep industry to Bernalillo County, the court concluded that such symbols could represent the Christian "lamb of God" or "flock of Jesus." [App. 3a-4a.]

The court distinguished the use of the county seal from the display of the creche in *Lynch v. Donnelly,* 465 U.S. 668 (1984), although the court found that "the religious significance of the cross, as of the creche, is undisputed." [App. 10a-11a.]

> But the seal, unlike the creche, pervades the daily lives of county residents. It is not displayed once a year for a brief period on a single parcel of government land. Rather it appears on all county paper work, on all county vehicles, even on county sheriff's uniforms. Further, Bernalillo County residents do not view the cross and motto in the context of a generally secular commercial display, as Pawtucket, Rhode Island, residents do the creche.

[App. 11a.]

Although lacking any support in the record, the court continued with the following observation:

> A person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God. A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian.

[App. 11a.]

Thus, concluded the court, the power of the government appears to be placed behind a particular religious

belief, and, "[i]n view of the seal's composition and use, the county has violated the Establishment Clause." [App. 11a.]

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REASONS FOR GRANTING THE PETITION

The reasoning in the Tenth Circuit's opinion on rehearing *en banc* conflicts with this Court's reasoning in *Lynch v. Donnelly,* 465 U.S. 668 (1984), regarding the constitutionality of local government recognition of America's cultural and religious heritage. The question of the extent to which local governments can passively acknowledge specific historic religious influences that shaped the development of this country is of great public interest and national importance.

The use of crosses and spiritual mottos on state and local government flags, seals, and coats of arms is quite common in the United States. [*See* Chart following Conclusion.] However, the Tenth Circuit's restrictive reading of the Establishment Clause and its misinterpretation of Supreme Court precedents, has led that court to invalidate the use of the Bernalillo County seal. Application of the Tenth Circuit's reasoning on a national scale would require the purging of all benign references by local governments to the historical role of religion in American life.

I. THE REASONING OF THE TENTH CIRCUIT CONFLICTS WITH THIS COURT'S REASONING IN LYNCH V. DONNELLY.

The Establishment Clause decisions of this Court do not require government to eradicate all religious references that occur in dominantly secular settings. In *Lynch*

v. Donnelly, this Court upheld the erection of a creche by the City of Pawtucket, Rhode Island, as a passive acknowledgement of religion in the context of the Christmas season. The creche, along with other traditional seasonal symbols, was used in *Lynch* to celebrate the national holiday of Christmas.

In this case, a Latin cross and a Spanish motto, along with other historically relevant symbols, are used in Bernalillo County's seal to authenticate county documents and identify county property and personnel. [App. 3a.] The record in the present case establishes these facts unequivocally.[15] In addition to these primary governmental functions, the seal also serves to celebrate Bernalillo County's cultural and religious heritage by depicting the historic influences that molded the County's development. [App. 3a-4a.]

The cross and the motto serve as a benign acknowledgement of the role played by the Spanish Catholic missionaries in exploring and settling this region of the New World. [App. 3a-4a.] Although the symbol of the cross and the motto may have some religious significance, as noted by the district court [App. 49a], their contemporary usage in this case negates the Tenth Circuit's impression that the seal conveys the message that "Christianity is being endorsed." [App. 9a.]

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[15]The Tenth Circuit noted that "[i]t is at least possible that the *seal* had a secular purpose but that *specific elements* of it did not. [App. 7a, n.3 (emphasis in original).] However, the cross and the motto do not stand alone and must be viewed, like the creche in *Lynch,* in the context of the entire county seal, as an integrated part of the whole. *See Lynch v. Donnelly,* 465 U.S. at 680 ("[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.")

The prevalence of religious symbols, specifically crosses, on flags, seals, and coats of arms of state and local governments makes plenary Supreme Court review in this case of the utmost importance. In order to avoid wholesale invalidation by lower federal courts of local government actions that confer only an " 'indirect', 'remote', or 'incidental' benefit upon religious institutions," this Court must further define the contours of the Establishment Clause. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 771 (1973).

II. THE TENTH CIRCUIT'S MISAPPLICATION OF THE LEMON TEST PROVIDES THIS COURT WITH THE OPPORTUNITY TO REEXAMINE AND REFINE THE TEST.

The Tenth Circuit reversed the district court's finding that the Bernalillo County seal had "no principal or primary effect that advances or inhibits religion," [App. 5a], as "clearly erroneous" under the second prong of the *Lemon* Establishment Clause test [App. 7a].[16] The appellate court noted that "[t]he effect prong asks whether, irrespective of government's actual purpose, the practice *under review in fact* conveys a message of endorsement or disapproval."[17]

Citing a rabbi's testimony that "the cross had at times symbolized outright oppression and persecution of Jewish

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[16]The full text of the three-pronged *Lemon* test appears at page 7 n.11.

[17]The Tenth Circuit opinion, quoting with approval the concurring opinion of Justice O'Conner in *Lynch v. Donnelly*, 465 U.S. at 690, notably omitted the phrase *"under review in fact."*

people," [App. 9a], the Tenth Circuit made the following quantum leap in its reasoning.

> It cannot be denied, as one amicus brief argues, that the cross probably would have a similarly threatening connotation for a Lebanese Moslem or Northern Irish Protestant. We are compelled to draw the same conclusion with regard to the reactions of Native Americans who reside in Bernalillo County. The seal certainly does not memorialize their "Christian heritage" but rather that of those who sought to extinguish their culture and religion.[18]

[App. 9a.]

Thus, based upon the hypothetical reaction of various non-Christian groups to the Bernalillo County seal, the Tenth Circuit concluded that "the seal as used conveys a strong impression to the average observer that Christianity is being endorsed." [App. 9a.]

Given this grave misapplication by the Tenth Circuit of the "effect" prong of the *Lemon* test, the Court should take this opportunity to reexamine and refine the test in order to provide much needed guidance to lower courts grappling with the application of Establishment Clause principles.[19]

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[18]There is no evidence in the record as to the effect of the Bernalillo County seal *in fact* on any Lebanese Moslems, Northern Irish Protestants or Native Americans.

[19]*See Wallace v. Jaffree*, 105 S.Ct. 2479, 2497 (1985) (O'Conner, J. concurring) ("the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment.")

CONCLUSION

There is a clear and immediate need for this Court to define a workable standard to apply in Establishment Clause cases. Until this Court provides additional guidance for determining which governmental actions result in First Amendment infringements and which merely constitute passive recognition of religious influences on America's development, such widely accepted practices as the display of a cross on a county seal will be struck down. The Court should grant this Petition for Writ of Certiorari and resolve the confusion that exists.

Respectfully submitted,

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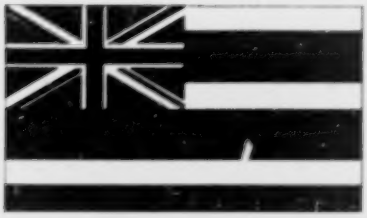
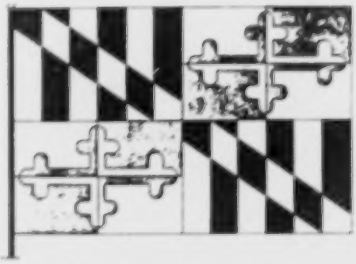
Sampling of Current Government Flags, Seals, and Coats of Arms That Symbolize America's Religious Heritage

CROSSES



Hawaii State Flag
(Union Jack Composed of the Three Crosses of St. Andrew, St. George, and St. Patrick)



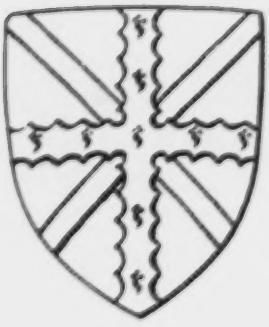
Maryland State Flag
(Two Crosses Botonnée)

Oklahoma State Flag

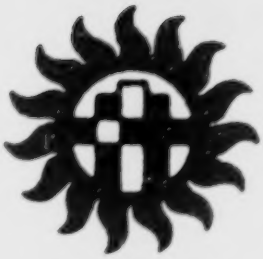
Puerto Rico Coat of Arms
(Paschal Lamb Bordered by Crosses Crosslet)

Boylston, Massachusetts Coat of Arms

Coral Gables, Florida



Princeton, Massachusetts

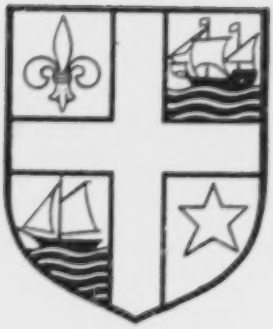


Las Cruces,
New Mexico
Seal
(Name of City
Translates:
"The Crosses")

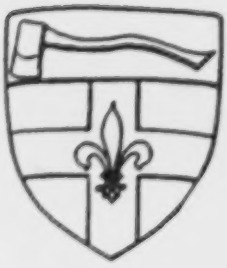
York, Pennsylvania
Coat of Arms
(Court House
on Cross)

Pensacola, Florida
Coat of Arms
(Latin Cross
Over Helmet)

Bernalillo County,
New Mexico
Seal
(Latin Cross
Botonnée)



New Rochelle,
New York
Coat of Arms



Lincoln,
Rhode Island
Coat of Arms

Warwick,
Rhode Island
Coat of Arms
(Three Crosses
Botonnée)

Rockland,
Massachusetts
Coat of Arms
(Three Crosses
Patée)

Zion, Illinois
Coat of Arms
(Latin Cross;
City Motto:
"God Reigns")

SALTIRES (Commonly Known As CROSSES OF ST. ANDREW)

Florida State Flag

Georgia State Flag

Richmond,
Virginia
Coat of Arms

Canton,
Massachusetts
Coat of Arms

CHURCHES

Hingham,
Massachusetts
Seal

Medway,
Massachusetts
Coat of Arms

St. Paul,
Minnesota
Coat of Arms

Swansea,
Massachusetts
Coat of Arms

Weymouth, Massachusetts
Seal

Groton, Massachusetts
Seal

San Juan, Puerto Rico
Coat of Arms
(Paschal Lamb
Carrying Cross)

Colorado State Seal
(All-Seeing Eye in
Mystic Triangle;
Motto Translates:
"Nothing Without the Deity")

United States Great Seal
(All-Seeing Eye in
Mystic Triangle)

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1064

———o———

AL FRIEDMAN,

Plaintiff-Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, DAVID SANTILLANES, Chairman; JUVEN SANCHEZ, ROBERT HAWK, WRAY SIMMONS, E. R. (CORKY) MORRIS, Members,

Defendants-Appellees.

AMERICAN JEWISH CONGRESS and THE RUTHERFORD INSTITUTE,

Amicus Curiae.

———o———

Opinion on Rehearing En Banc

———o———

December 26, 1985

Paul A. Phillips, Cooperating Attorney, A.C.L.U. of New Mexico, Albuquerque, New Mexico, for Plaintiff-Appellant.

Casey Shpall, Mountain States Legal Foundation, Denver, Colorado, Roger J. Marzulla, Maxwell A. Miller, and Michael R. Perna also of Mountain States Legal Foundation, Denver, Colorado, and Hunter L. Geer, Albuquerque, New Mexico, on the briefs) for Defendants-Appellees.

Ronald A. Krauss, Lois C. Waldman, and Marc D. Stern, American Jewish Congress, New York, New York, and Michael G. Sutin, Albuquerque, New Mexico, filed a brief for amicus curiae American Jewish Congress, et al.

John W. Whitehead and D. Kevin Ikenberry of the Rutherford Institute, Manassas, Virginia, filed an amicus curiae brief.

Before HOLLOWAY, Chief Judge, McWILLIAMS, BARRETT, McKAY, LOGAN, SEYMOUR, and MOORE, Circuit Judges.

LOGAN, Circuit Judge

This case challenges a county government's use of a seal bearing, among other things, a latin cross and the Spanish motto, "CON ESTA VENCEMOS," under the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution and under the New Mexico Constitution. The district court found no constitutional violations, *Johnson v. Board of County Commissioners,* 528 F. Supp. 919, 925 (D. N.M. 1981), and a divided panel of this court affirmed. On rehearing en banc, we now vacate our earlier opinions and reverse on Establishment Clause grounds.

I

The circular seal that plaintiff challenges in this action under 42 U.S.C. § 1983 contains the phrases, "Ber-

nalillo County," and "State of New Mexico," separated by two diamonds along its outermost green edge. Within an inner circle, the Spanish motto, "CON ESTA VENCEMOS," which translates into English as, "With This We Conquer," or "With This We Overcome," arches over a golden latin cross,[1] highlighted by white edging and a blaze of golden light. The motto and cross are set in a blue background depicting the sky over four darker blue mountains and a green plain. Eight white sheep stand on the plain. Copies of the seal follow as an appendix to this opinion.

There is no record of when the county originally adopted the seal or of its purpose in doing so. The seal was used, however, on some county documents as early as 1925, and again from at least 1945 to 1956. Since 1973, the seal has been displayed on county documents, stationery, motor vehicles, and the shoulder patches of sheriff's department officers. According to testimony, officials expanded use of the seal merely to identify the county as a governmental unit distinct from Albuquerque.

Yet at least one county commissioner testified that at the time use of the seal was expanded he knew the cross represented the role of the Catholic Church in the settlement of the Southwest. Specifically he thought that the cross referred to priests and friars who accompanied Spanish conquistadors into the area. Two historians and an expert in heraldry testified that the cross on the seal

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[1] The cross occupies roughly half of the seal, which means the cross alone stands approximately one foot high when it appears on county vehicles of the type shown in the appendix, *infra*.

represented Catholicism, Christianity, and the Spaniards. One of the historical experts also admitted that religious conversion of the Native American population in New Mexico sometimes was accomplished through force; the other verified use of Spanish Inquisition tactics in New Mexico.

The evidence is not completely clear on the meaning of "ESTA" or "this" in the motto, but plaintiff's expert on the Spanish language testified that the only thing "ESTA" referred to very clearly was the cross. Even one of defendants' expert historians testified that, if the cross were eliminated, his interpretation of the seal's meaning, i.e., "We are overcoming with our Christian heritage," would be less than obvious. But he thought "ESTA" literally referred to the entire seal. Lay witnesses for the plaintiff and the defendants understood the "this" of the motto to be the cross.

The interpretation to be given the appearance of the sheep on the seal also was the subject of some dispute, generally divided along a layperson-expert line. Plaintiff testified that the sheep apparently represented the "flock of Jesus." The defendants' experts, on the other hand, saw the sheep as symbolic of the importance of the sheep-raising industry in Bernalillo County history, and not of the Christian "lamb of God" or "good shepherd" or "flock of Jesus."

The district court found no violation of the three-part Establishment Clause test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), having been persuaded by the testimony of the defendants' experts that the significance

of the sheep and cross was solely historical.[2] *Johnson*, 528 F. Supp. at 923-25. The court also characterized the amount of money the county must spend for display of the motto and cross as minimal, and dismissed the Free Exercise claim. *Id.* at 925. Although the district court recited the claim under Article II, Section 11 of the New Mexico Constitution and said it was properly joined under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), it did not discuss explicit reasons for rejecting it. *Id.* at 920. Because we find the Establishment Clause issue dispositive, we do not address the Free Exercise Clause and New Mexico constitutional claims.

II

The district court correctly began its analysis with recitation of the three independent tests of *Lemon*, 403 U.S.

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[2] The precise standard for our review of "constitutional facts," such as the district court's findings on each prong of the *Lemon* test, is unclear. In the Establishment Clause case of *Lynch v. Donnelly*, 52 U.S.L.W. 4317 (U.S. March 5, 1984), Chief Justice Burger referred to the "clearly erroneous" standard, *id.* at 4321, and the dissent by Justice Brennan agreed. *Id.* at 4327 n.11 (Brennan, J., dissenting). Justice O'Connor's concurrence, however, referred to the district court's conclusion as "error as a matter of law." *Id.* at 4324 (O'Connor, J., concurring). Further, in the later case of *Bose Corp. v. Consumers Union of United States, Inc.*, 52 U.S.L.W. 4513, 4520 (U.S. Apr. 30, 1984), the Court held that the clearly erroneous standard did not govern appellate review of a finding of malice by the factfinder under a First Amendment standard. The Court stated: "Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact." *Id.* at 4518 n.17. *Cf. Miller v. Fenton*, 54 U.S.L.W. 4022, 4024 (U.S. Dec. 3, 1985) (voluntariness of confession is a legal question requiring independent federal determination).

Under either standard we would reverse; therefore we need not decide which standard applies under the Establishment Clause.

at 612-13. Although the Supreme Court has been unwilling to endorse *Lemon* as the "be-all" and "end-all" in Establishment Clause cases, it has continued to apply it almost exclusively. *See Wallace v. Jaffree,* 53 U.S.L.W. 4665, 4670 (U.S. June 4, 1985); *Lynch v. Donnelly,* 52 U.S.L.W. 4317, 4320 (U.S. Mar. 5, 1984); *cf. Marsh v. Chambers,* 463 U.S. 783 (1983) (*Lemon* test not used in Establishment Clause challenge to state legislature's use of chaplain; use upheld); *Larson v. Valente,* 456 U.S. 228 (1982) (*Lemon* test not used in Establishment Clause challenge to charitable solicitation law; law invalidated). *See generally* Smith, *Some Observations on the Establishment Clause,* Pepperdine L. Rev. 457, 469 (1984); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 Duke L.J. 770, 782 (1984).

Under *Lemon* the Establishment Clause is violated if any of the three following conditions are not met. First, the governmental action in question must have a secular purpose. Second, its principal or primary effect must be one that "neither advances nor inhibits" religion. And, third, the action must not foster an excessive government entanglement with religion. *Lemon,* 403 U.S. at 612-13. The goal is the prevention of "unnecessary intrusion of either the church or the state upon the other." *Lynch,* 52 U.S.L.W. at 4318. Each prong of the *Lemon* test is independent. The challenged government action must survive all three to be allowed under the Establishment Clause. *See id.* at 4670; *Stone v. Graham,* 449 U.S. 39, 40 (1980); *Bell v. Little Axe Independent School District,* 766 F.2d 1391, 1402 (10th Cir. 1985).

III

Our review of the record convinces us that the district court's finding in favor of the county on the second prong of *Lemon*—the "effect" test—was clearly erroneous.[3] "The Establishment Clause prohibits the government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch*, 52 U.S.L.W. at 4322 (O'Connor, J., concurring). "The effect prong asks whether, irrespective of government's actual purpose, the practice . . . conveys a message of endorsement or disapproval. An affirmative answer . . .

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[3] We do not explicitly reject the district court's findings of an adequate secular purpose and of no excessive entanglement. Yet we note that all courts must be wary of accepting after-the-fact justifications by government officials in lieu of genuinely considered and recorded reasons for actions challenged on Establishment Clause grounds. We must be vigilant to distinguish between sham and sincere purposes. *See Wallace*, 53 U.S.L.W. at 4670-71; *id.* at 4675 (O'Connor, J., concurring); *Little Axe*, 766 F.2d at 1403. In this case there was no evidence of the county's purpose for originally adopting the seal; the purported motive for the later expansion of its use was county identification. Yet county officials and the district court recognized the religious significance of the cross, and lay witnesses reacted to what they perceived to be religious symbolism in the sheep. It is at least possible that the *seal* had a secular purpose but that *specific elements* of it did not.

In addition, we must caution that courts not be too easily convinced that the administrative or political entanglement demonstrated in a given case is de minimis because of the limited monetary value of the government's involvement. Here the district court acknowledged that, in spite of the county's denials, "some cost must be attributable to the display of the seal." *Johnson*, 528 F. Supp. at 925. Expense is not the only path to entanglement. And, even if it were, we must remember that it is no defense to say that the government's action represents a "relatively minor encroachment on the First Amendment." *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963).

should render the challenged practice invalid." *Id.* at 4323. In other words, the existence of a non-secular effect is to be judged by an objective standard, which looks only to the reaction of the average receiver of the government communication or average observer of the government action. This contrasts with the subjective examination under the purpose test. If the challenged practice is likely to be interpreted as advancing religion, it has an impermissible effect and violates the Constitution, regardless of whether it actually is intended to do so.

In addition, the resulting advancement need not be material or tangible. An implicit symbolic benefit is enough. *See Larkin v. Grendel's Den*, 459 U.S. 116, 125 (1982). In *Larkin* the Supreme Court struck down a Massachusetts statute granting churches and schools the de facto power to veto liquor license applications for businesses within a certain distance of the institutions. The Court stated:

> "[T]he *mere appearance* of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can be seen as having a 'primary' and 'principal' effect of advancing religion."

Id. at 125-26 (emphasis added). Similarly we have held that even the unspoken grant of a state "imprimatur" to religious activity in primary schools is impermissible under the effect test. *See Little Axe*, 766 F.2d at 1405. "The Government may depict objects with spiritual content, but it may not promote or give its stamp of approval to such spiritual content." *Allen v. Hickel*, 424 F.2d 944, 948 (D.C. Cir. 1970).

Some uses of the seal at issue in the case before us might not give an appearance or imprimatur of impermissible joint church-state authority. Use similar to a notary seal on county documents or a one-color depiction in which the seal and especially the cross are not easily discernible might not pass the threshold. But this is not such a case. Here the county prominently displays the seal on county vehicles and uses it to identify law enforcement officers. Plaintiffs presented highly persuasive evidence that the seal leads the average observer to the conclusion that the county government was "advertising" the Catholic faith. A rabbi testified that the seal suggested to him that there was an "officialness" about Christianity in the state and county. In addition, he pointed out that the cross had at times symbolized outright oppression and persecution of Jewish people. It cannot be denied, as one amicus brief argues, that the cross probably would have a similarly threatening connotation for a Lebanese Moslem or Northern Irish Protestant. We are compelled to draw the same conclusion with regard to the reactions of Native Americans who reside in Bernalillo County. The seal certainly does not memorialize their "Christian heritage" but rather that of those who sought to extinguish their culture and religion.

At the least, then, the seal as used conveys a strong impression to the average observer that Christianity is being endorsed. It recalls a less tolerant time and foreshadows its return. Religious minorities may not be made to feel like outsiders because of government's malicious or merely unenlightened endorsement of the majority faith. It is not decisive that defendants' heraldic and his-

torical experts, and lay witnesses who are members of Christian sects, reacted less emotionally to the seal. It is to be expected that members of Christian sects would be more comfortable with a seal endorsing their beliefs than would individuals who adhere to different beliefs. The comfort of the majority is not the main concern of the Bill of Rights. Rather, its

> "very purpose . . . was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943). The Supreme Court "has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select *any* religious faith or none at all." *Wallace*, 53 U.S.L.W. at 4669 (emphasis added).

This case is not like the creche display upheld in *Lynch*, 52 U.S.L.W. at 4322. The religious significance of the cross, as of the creche, is undisputed; the district court correctly observed that any statement to the contrary would be disingenuous.[4] *Johnson*, 528 F. Supp. at 924.

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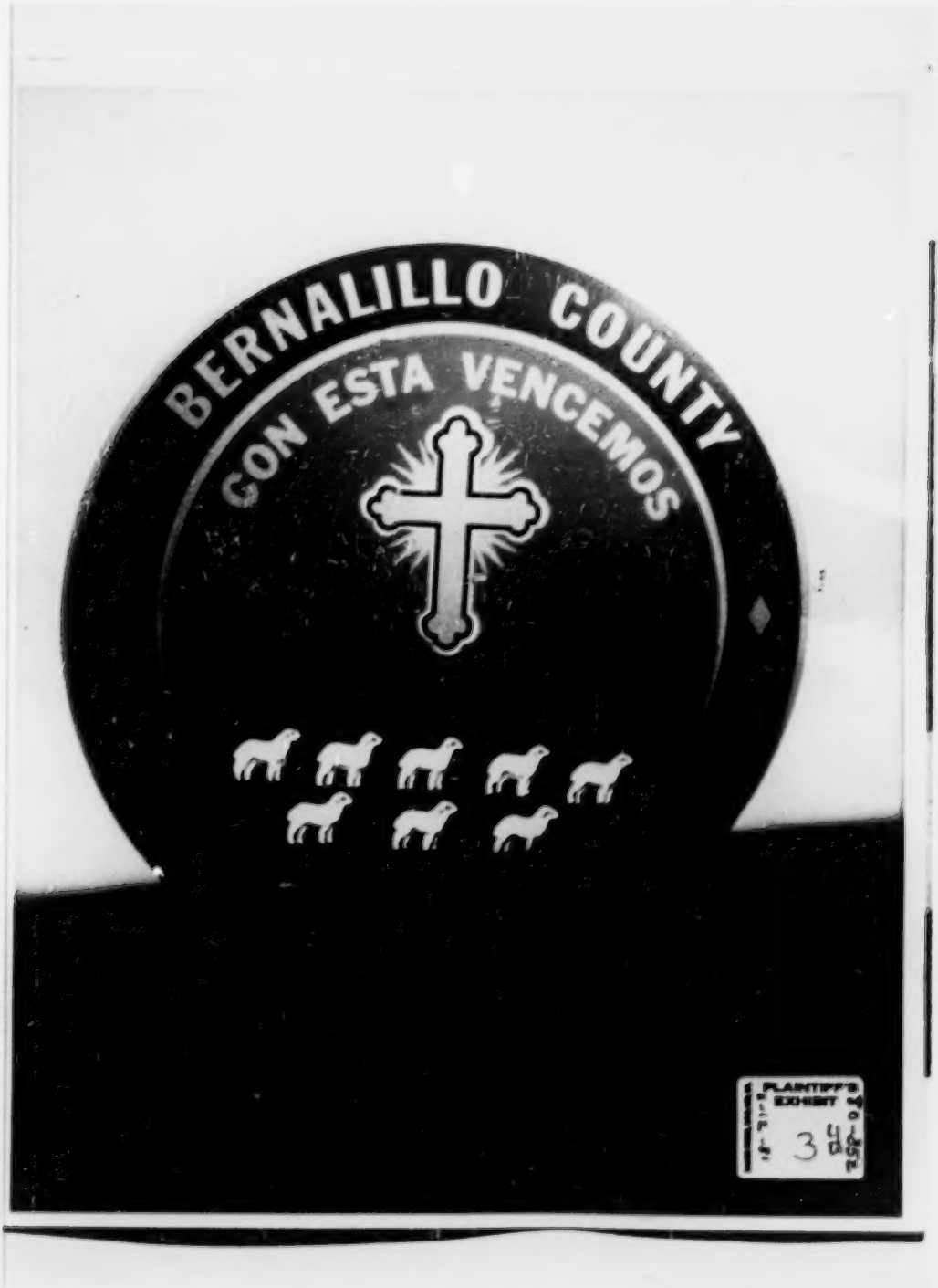
[4] The district court asserted that it would be "correspondingly disingenuous to deny that Catholicism was the preeminent religion in the early days of this territory." 528 F. Supp. at 924. This discounts the existence and importance of Native American religions, an assortment of belief systems that preceded Christianity in preeminence. The Spanish colonists were not the only persons inhabiting New Mexico who needed religion to keep themselves "physically and spiritually alive." *Cf. Johnson*, 528 F. Supp. at 922.

But the seal, unlike the creche, pervades the daily lives of county residents. It is not displayed once a year for a brief period on a single parcel of government land. Rather it appears on all county paper work, on all county vehicles, even on county sheriff's uniforms. Further, Bernalillo County residents do not view the cross and motto in the context of a generally secular commercial display, as Pawtucket, Rhode Island, residents do the creche. The context of the cross and motto is quite different. The cross is the only visual element on the seal that is surrounded by rays of light. The motto may be fairly regarded as promoting the religion the cross represents. Indeed, that religion seems to be embraced as the instrument by which the county "conquers."

A person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God. A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian. "When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Abington School District v. Schempp*, 374 U.S. 203, 221 (1963) (quoting *Engle v. Vitale*, 370 U.S. 420, 430-31 (1962)).

In view of the seal's composition and use, the county has violated the Establishment Clause. We therefore REVERSE.


BERNALILLO COUNTY
CON ESTA VENCEMOS
PLAINTIFF'S EXHIBIT
3

PLAINTIFF'S EXHIBIT
82-852
JB
1
11-12-81

No. 82-1064 — FRIEDMAN v. BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, DAVID SANTILLANES, CHAIRMAN, JUVEN SANCHEZ, ROBERT HAWK, WRAY SIMMONS, E. R. (CORKY) MORRIS, Members

McWilliams, Circuit Judge, dissenting:

I adhere to the opinion of the panel which initially heard this case and the views expressed therein by Chief Judge Holloway.

NO. 82-1064 — FRIEDMAN v. BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, DAVID SANTILLANES, CHAIRMAN, JUVEN SANCHEZ, ROBERT HAWK, WRAY SIMMONS, E. R. (CORKY) MORRIS, MEMBERS

BARRETT Circuit Judge, dissenting:

I join Judge McWilliams in dissent based upon the views expressed by Chief Judge Holloway in his fifteen page opinion written for the panel majority which rejected the challenges raised by plaintiff-appellant under the Establishment Clause, the Free Exercise Clause, and the New Mexico Religion Clause. That learned opinion properly concluded "[T]hat the Bernalillo County seal does not violate either the Establishment or Free Exercise Clauses of the First Amendment or the Religion Clause of the New Mexico Constitution."

In addition to the views expressed in Chief Judge Holloway's opinion for the panel majority, I wish to express the following views:

The application of the *Lemon v. Kurtzman,* 403 U.S. 602 (1971) test is helpful *only* if applied in a common sense perspective. In this great land of amalgamated races, nationalities and religious backgrounds, we must

be cognizant of significant aspects of our rich history and culture. It was this premise that the Supreme Court relied upon in *Lynch v. Donnelly,* 52 U.S.L.W. 4317 (U.S., March 6, 1984) in holding that there was no constitutional infirmity in public funding and display of the historical national Christmas season scene of the creche, a specific religious symbol, in conjunction with secular symbols such as reindeer, Santa Claus, sleighs, etc. The Court there held that the display was justified because of legitimate secular purposes, and that a *dual* purpose can be served in the public display of a religious symbol. Such is the case at bar. The creche in *Lynch v. Donnelly* represented a Christian religious symbol. However, it did not involve a First Amendment entanglement violation because the Supreme Court held that the deep secular, historical and cultural aspects of the entire display were more weighty on the constitutional scale. Here, too, the display of the Christian symbol of the Cross, in combination with the secular symbols, has deep historical and cultural significance to Bernalillo County; thus, as in *Lynch,* the Cross and the Motto serve a dual purpose, justifying the entire seal because of legitimate secular purposes in the overall scheme.

During the course of oral argument in this *en banc* hearing, counsel for the defendants-appellees asked, in the sense of the "effects" prong of *Lemon v. Kurtzman,* how this court could justify the invocation of God's grace upon its deliberations which has been historically employed in the opening of each daily court session. There was no response. This nation has been recognized as one of religious people; therefore, a certain amount of church-state "entanglement" will always exist. *Abington School Dist. v. Schempp,* 374 U.S. 203 (1963).

We are all aware that public school graduation ceremonies have historically included a call upon God's blessings and guidance in the course of invocation and benediction exercises. This practice has a long established historical tradition. The line of separation of church and state required under the Establishment Clause is neither straight nor easily determined. *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980). The First Amendment does not forbid all reference to religion in public schools; rather, it requires that religion be neither advanced or inhibited. *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). In the context of the seal of Bernalillo County involved in this case, it is my view that the religious symbols do not advance religion.

Chief Justice Burger, in dissent in *Wallace v. Jaffree and Smith v. Jaffree*, Nos. 83-812 and 83-929 (53 U.S.L.W. 4665, June 4, 1985) pertinently stated:

> Some who trouble to read the opinions in this case will find it ironic — perhaps even bizarre — that on the very day we heard arguments in this case, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and the Senate regularly open each session with a prayer. These legislative prayers are not just one minute in duration, but are extended, thoughtful invocations and prayers for Divine guidance. They are given, as they have been since 1789, by clergy appointed as official chaplains and paid from the Treasury of the United States. Congress has also provided chapels in the Capitol, at public expense, where Members and others may pause for prayer, meditation — or a moment of silence.

* * *

> . . . Congress amended the statutory Pledge of Allegiance 31 years ago to add the words "under God" . . . Do the several opinions in support of the judgment today render the Pledge unconstitutional? . . .
>
> * * *
>
> This Court's extended treatment of the "test" of *Lemon v. Kurtzmann* [sic], 403 U.S. 602 (1971), suggests a naive pre-occupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts" . . . our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion . . . "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *School District v. Schempp*, 374 U.S. 203, 208 (1963) (concurring opinion) . . . The mountains have labored and brought forth a mouse. [Footnotes omitted].

53 U.S.L.W. at 4678, 4679.

I would AFFIRM the district court's common-sense opinion.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1064

AL FRIEDMAN,

Plaintiff-Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, DAVID SANTILLANES, CHAIRMAN, JUVEN SANCHEZ, ROBERT HAWK, WRAY SIMMONS, E. R. (CORKY) MORRIS, Members,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

(D.C. No. 80-852 JB)

December 27, 1984

Paul A. Phillips, Cooperating Attorney, (Raymond W. Schowers, Legal Director, A.C.L.U. of New Mexico, with him on the brief) Albuquerque, New Mexico, for plaintiff-appellant.

Michael R. Perna, Mountain States Legal Foundation, Denver, Colorado (Hunter L. Geer, Albuquerque, New Mexico; Roger J. Marzulla and Maxwell A. Miller, Mountain States Legal Foundation, Denver, Colorado, were also on the brief), for defendants-appellees.

Before HOLLOWAY, Chief Judge, McWILLIAMS and LOGAN, Circuit Judges

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HOLLOWAY, Chief Judge

Plaintiff appeals the district court's ruling that the county seal of Bernalillo County, New Mexico, bearing, among other things, a cross and the motto "CON ESTA VENCEMOS," does not violate the Establishment and Free Exercise Clauses of the First Amendment and the Religion Clause of the New Mexico Constitution. We are persuaded that the seal, as used in the circumstances of this case, does not violate the federal or state constitutional provisions, and we affirm.

I

The factual background

The facts of the case are summarized in the district court's opinion, *Johnson v. Board of County Commissioners of Bernalillo County*, 528 F. Supp. 919, 920-23 (D. N.M. 1981), and are not in dispute.

The case concerns the county seal of Bernalillo County, New Mexico. As the district court explained, the seal "is a circle around the edge of which appear the words:

'County Commissioners—Bernalillo County, New Mexico.' Within an inner circle; the words 'CON ESTA VENCEMOS' stand against a background depicting the sky. Below these words is a cross centered over four blue mountains. Beneath the mountains is a green plain against which eight sheep are imposed." *Id.* at 920-21. Copies of the seal from Plaintiff's Exhibits 3 and 4 are attached as appendices to this opinion. Expert testimony indicated that the motto "CON ESTA VENCEMOS" translates into English as "with this we conquer," "with this we overcome," or "with this we win." *Id.* at 922.

Although there is no record of the original adoption of the seal, III R. 105, 109-10, it appeared on certain county documents as early as 1925. 528 F. Supp. at 921; Defendant's Exhibit A; III R. 43, 110. Since 1973, the seal has appeared on county documents and stationery and has been displayed on county motor vehicles and on shoulder patches of officers of the Sheriff's department. 528 F. Supp. at 921; Plaintiff's Exhibits 1-4; III R. 65-66, 91, 98, 123, 132-33.

Plaintiff brought this § 1983 action seeking a declaratory judgment and an injunction to prevent defendants from displaying the seal and from appropriating funds for the display of the seal. Plaintiff Friedman, an atheist and an ethnic Jew, contended that the seal propagated the Christian faith and therefore violated the Establishment and Free Exercise Clauses of the First Amendment, as well as Article II, Section 11 of the New Mexico Constitution.[1]

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[1] Jurisdiction was asserted under 28 U.S.C. §§ 1343(3), 1343(4), 2201, and 2202. 528 F. Supp. at 920.

The district court rejected the constitutional claims of plaintiff challenging the seal. The court recited expert testimony on the history of Catholicism in New Mexico. The court pointed to the testimony of Mr. Johnson, the curator of history at the Albuquerque Museum, that the cross in the seal was symbolic of the long history of Catholic exploration, the Church's missionary endeavors, and the impact of the church on early Hispanic life in the region. *Id.* at 922-23. The court also referred to testimony by Dr. Charles Polzer, a Jesuit priest and ethno-historian from the University of Arizona, that sheep raising was the primary industry in colonial Bernalillo County. In his view, the sheep could not be a religious symbol since such a symbol would require a "life-form" which does not appear in the seal. Dr. Polzer testified that Christianity played a significant role in southwestern history. He viewed the cross not as a religious symbol but as an historic symbol of the Christian and Spanish heritage of New Mexico. Mr. Beckwith, an expert in heraldry, also found the seal to be symbolic of the Spanish heritage of New Mexico and the sheep raising industry of the region. *Id.* at 923.

The court then dealt with the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), under the Establishment Clause. First, the court found that there was a secular legislative purpose served by the seal. The court acknowledged that the cross had religious significance, but explained that Catholicism cannot be separated from New Mexico history. The court pointed to the religious significance of geographical terms adopted in the State such as Santa Fe and the Sangre de Cristo mountain range. The court found that the purpose of the seal in its pres-

ent form is to authenticate official documents and communications and to identify County property and personnel of the Sheriff's office. The court also found that the seal was used to promote appreciation of the heritage, history and cultural pride of Bernalillo County.

Next, the court considered the effect of the seal under the second prong of the *Lemon* test. The court acknowledged that although government may depict objects with a spiritual content, it cannot promote or give its stamp of approval to such spiritual content. The court concluded that the cross and motto had only a benign reference to religion. The court viewed the seal as an iconographic illustration of the rich cultural heritage of Bernalillo County. The court held that the principal or primary effect did not advance or inhibit religion. *Id.* at 924.

The court then considered the third part of the test—whether excessive government entanglement resulted from the use of the seal. The court found that although no evidence was offered as to the amount of county funds allocable to the display of the motto and the cross, the provision of funds therefor was minimal. The court perceived no benefit gained by any religious group by the display of the cross and motto.

The court also concluded that the county seal did not violate the Free Exercise Clause. In the court's view the seal was more of an historical symbol than a religious expression.

The Memorandum Decision And Order did not discuss reasons for rejecting the claim that the seal violated Article II, Section 11 of the New Mexico Constitution. The court recited the allegation and held that jurisdiction

of this state-law issue was properly before it under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Thus the court had the New Mexico constitutional claim before it and implicitly rejected the claim.

II

The Establishment Clause

The First Amendment declares in part that "Congress shall make no law respecting an establishment of religion." This constitutional principle has been held applicable to the states through the Fourteenth Amendment for some time. *See e.g., Widmar v. Vincent*, 454 U.S. 263, 271 n.8 (1981). The Establishment Clause challenge presents what we feel is a close question and the most serious issue in this controversy.

In determining whether the adoption and use of the Bernalillo county seal violate the Establishment Clause, we recognize at the outset "the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible." *Lynch v. Donnelly*, 52 U.S.L.W. 4317, 4318 (U.S. March 6, 1984). The Court has rejected a "rigid, absolutist view of the Establishment Clause." *Id.* at 4320. "Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." *Id.*

In making this determination, the Court has emphasized its "unwillingness to be confined to any single test or criterion in this sensitive area." *Id.* Nevertheless, the Court typically examines Establishment Clause challenges under the three-part test first crystallized in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To pass muster under this test, the challenged governmental conduct must (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) avoid excessive entanglement of government with religion. *Id.* at 612-23; *see also Lynch v. Donnelly*, 52 U.S.L.W. at 4320.

A. *Purpose*

The district court found that a secular legislative purpose is served by the county seal. The court held that the purpose of the seal, in its present form, "is to authenticate official documents, authenticate official communications, and to facilitate identification of County property and personnel of the County Sheriff's office. Simultaneously, it is used to promote the appreciation of the heritage, history and cultural pride of Bernalillo County." 528 F. Supp. at 924.

The court acknowledged that "the cross has a religious significance." *Id.* at 924. The plaintiff vigorously argues that this finding demonstrates error in the court's conclusion that the Establishment Clause is not violated. We feel that the use of the cross, with the motto "CON ESTA VENCEMOS," is a most troubling problem.

While the cross is the primary symbol of Christianity, the Establishment Clause does not prohibit all references

to objects of some religious significance. The Court has long recognized that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). In *Lynch v. Donnelly*, the Court rejected the claim that a city's use of a creche as part of a seasonal display violated the Establishment Clause. The Court emphasized the historical significance of the creche in finding that the secular purpose prong of the *Lemon* test was satisfied. 52 U.S.L.W. at 4320, 4322. Here the district court pointed to the various historic elements in the seal and their role in early county history: the predominant sheep raising industry, the Catholic missionaries, and the mountainous region all affected the settlement and development of the county.

Considering the circumstance of the use of the seal as a whole, we conclude that the trial court's finding that the seal as used has a permissible secular purpose is not clearly erroneous.[2] *See Lynch v. Donnelly*, 52 U.S.L.W. at 4321 (majority opinion) (district court's finding that

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[2] Chief Justice Burger, writing for the majority in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), noted that a proper inquiry under the secular purpose prong of the *Lemon* test is whether "valid secular objectives can be readily accomplished by other means." *Id.* at 123-24. *See also School District of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) (government "may not employ religious means to achieve a secular goal unless secular means are wholly unavailing"); *ACLU of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 111 [sic] (11th Cir. 1983) (same).

Lynch v. Donnelly, however, indicated that analysis of possible alternative means to achieve the city's secular goals was not required. This statement was made in the context of the historical artistic display decision there made, which bears similarity to the instant case. The dissent in *Lynch* vigorously argued

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seasonal display lacks secular purpose was "clearly erroneous"); *id.* at 4327 n.11 (Brennan, Marshall, Blackmun and Stevens, JJ., dissenting) (petitioners have not shown that trial court's detailed findings under the three-part analysis called for by prior Supreme Court cases were clearly erroneous);[3] *see also ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1100-11

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that the *Larkin* alternative means analysis was relevant in determining whether the city's seasonal display, which included the creche, furthered a secular purpose. 52 U.S.L.W. at 4325-26 (Brennan, J., dissenting). Chief Justice Burger, writing for the majority, rejected this argument in a footnote: "[The dissent] argues that the city's [secular] objectives could have been achieved without including the creche in the display, *post*, at 6. True or not, that is irrelevant. The question is whether the display of the creche violates the Establishment Clause." *Id.* at 4321 n.7.

In light of the Chief Justice's statements in the Court's opinion in *Lynch v. Donnelly*, we need not inquire here whether the county's secular objectives of authenticating official documents and communications, identifying documents and personnel, and promoting appreciation of the history and culture of the county can be accomplished by a seal not containing the cross and motto. *See Fausto v. Diamond*, 589 F. Supp. 451, 468 (D. R.I. 1984) ("[I]t is 'irrelevant' that these [secular] objectives could have been accomplished by some less intrusive or controversial means.") (citing footnote 7 of the majority opinion in *Lynch v. Donnelly*).

[3] The separate concurring opinion of Justice O'Connor makes reference to the secular purpose issue at 52 U.S.L.W. 4323, and she concludes that the district court's finding of an unlawful purpose was "clearly erroneous." However, in Part III B of her concurring opinion Justice O'Connor says that as to the findings on the effect test, whether Government activity communicates endorsement of religion is not a question of "simple historical fact"; that although evidentiary submissions may help answer the question, it is in large measure a legal question to be answered on the basis of judicial interpretation of social facts; and that the trial court's conclusion concerning the effect of the display was "in error as a matter of law." *Id.* at 4324.

(11th Cir. 1983) (district court's finding that erection of large, lighted cross on state property had religious purpose was not "clearly erroneous").

B. *Effect*

The district court held that the seal did not have a principal or primary effect that advances or inhibits religion. The court noted that the cross and motto on the seal made "only a benign reference to religion" and did not have a "principal or primary effect that advances or inhibits religion." 528 F. Supp. at 924. Instead, the court held that the seal, viewed "against the historical panorama," was "an iconographic illustration of the rich cultural heritage of Bernalillo County." *Id.* Although the court recognized that the county "may not promote or give its stamp of approval" to Christianity, the court apparently was satisfied that the seal did not represent an official endorsement of religion. *Id.*

The question of the effect of the seal is also a troubling one. However, the Supreme Court in *Lynch v. Donnelly* stated that:

> We can assume, *arguendo*, that the display [including the creche] advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect' ('remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid."

52 U.S.L.W. at 4321.

Justice Goldberg, while concurring in the holding of the Court that there was an Establishment Clause violation in *Abington School District v. Schempp*, 374 U.S. 203 (1963), stated:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Id. at 308.

Considered in light of the historical background and the actual use of the county seal as shown in this record, we must agree with the conclusion of the district court that the principal or primary effect of the seal's use is not violative of the Establishment Clause.

C. *Entanglement*

The district court also held that the seal did not engender excessive entanglement of government with religion. 528 F. Supp. at 924. We agree.

The Supreme Court has recognized that its "prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. *Zorach v. Clauson,* 343 U.S. 306, 312 (1952); *Sherbert v. Verner,* 374 U.S. 398, 422 (1963) (Harlan, J., dissenting)." *Lemon v. Kurtzman,* 403 U.S. at 614. Here, there is no evidence of administrative contacts with an enduring entanglement between church and state as in *Lemon. Id.* at 619. Nor is there a showing of divisive political potential by use of the seal. *Id.* at 622. The record contains no substan-

tial evidence of prohibited entanglement arising from past or present relationships of the county and church authorities. We therefore agree with the district court's conclusion that the county seal did not cause excessive entanglement of government with religion.

In sum, we agree with the district court's holding that the display of the county seal in the manner indicated in this record does not violate the Establishment Clause.

III

Free Exercise Clause

Plaintiff argues that the seal violates his rights guaranteed by the Free Exercise Clause. The district court held that plaintiff "did not articulate, however, how the symbolism of the cross and the motto, as perceived by him, affected his right to believe or not to believe in a deity or how it affected his ethnicity." 528 F. Supp. at 925. Plaintiff contends on appeal that "he is inhibited in his atheism by the requirement that his County's vehicles and stationery bear the cross." Appellant's Brief 21.

The Supreme Court has held that a plaintiff raising a free exercise challenge must show that the challenged governmental action burdens or interferes with the free exercise of his religion. *See, e.g., United States v. Lee,* 455 U.S. 252, 256-57 (1982); *Thomas v. Review Board,* 450 U.S. 707, 717-18 (1981); *Wisconsin v. Yoder,* 406 U.S. 205, 215-19 (1972); *Sherbert v. Verner,* 374 U.S. 398, 403-06 (1963); *see generally* J. Nowak, R. Rotunda & J. Young. *Constitutional Law* 1053-63 (2 ed. 1983). We conclude that the use of the seal on county documents, stationery and

property does not burden or interfere with the free exercise of religion. The display of the seal does not discourage plaintiff or other individuals from exercising their religious beliefs or nonbeliefs. *Compare United States v. Lee*, 455 U.S. at 256-57 (compulsary participation in social security system burdened free exercise of Amish religion); *Thomas v. Review Board*, 452 U.S. at 717-18 (state's denial of unemployment compensation to Jehovah's Witness who quit job producing turrets for military tanks burdened free exercise of religious faith); *Wisconsin v. Yoder*, 406 U.S. at 215-19 (compulsary public education beyond eighth grade burdened free exercise of Amish religion); *Sherbert v. Verner*, 374 U.S. at 403-06 (1963) (denial of state unemployment benefits burdened free exercise rights of Seventh Day Adventist who refused to work on Saturdays due to her religious beliefs).

We therefore hold that the seal does not violate the Free Exercise Clause of the First Amendment.

IV

The New Mexico Religion Clause

Last, we turn to the plaintiff's constitutional claim under Article II, Section 11 of the New Mexico Constitution. We agree with the conclusion of the district court that this state law claim is properly before us under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The district court refused defendant's request to abstain in a separate Memorandum and Order. We *also* agree that abstention is not appropriate in this case.[4]

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[4] Although neither party raises the abstention issue on appeal, we briefly discuss it here because *Pullman* abstention may be

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raised by the court sua sponte. *Bellotti v. Baird*, 428 U.S. 132, 143-44 n.10 (1976); *see also Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4243 at 471 (1978).

The decision whether to abstain is largely committed to the discretion of the district court. *See Smith v. Paulk*, 705 F.2d 1279, 1282 (10th Cir. 1983) (quoting *Ramos v. Lamm*, 639 F.2d 559, 564 n.4 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)). Abstention is appropriate under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941), if there are unsettled questions of state law that may dispose of the case and obviate the need for deciding the federal constitutional question. *See also Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981); 17 C. Wright, A. Miller & E. Cooper, *supra*, § 4242.

The district court held that although the language of N.M. Const. art II, § 11 "does not parallel that of the First Amendment to the United States Constitution, it would appear that its goal is the same: to prevent the establishment of religion by the government and to protect the free exercise of religion." I R. 138.

The Supreme Court has stated that "abstention is not required for interpretation of parallel state constitutional provisions. *Hawaii Housing Authority v. Midkiff*, 52 U.S.L.W. 4673, 4675 n.4 (U.S. May 29, 1984); *see also Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 598 (1976) ("[T]o hold that abstention is required because [a state statute] might conflict with the [state's] broad and sweeping constitutional provisions, would convert abstention from an exception into a general rule."); *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 84-85 n.8 (1975) ("In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), we declined to order abstention where the federal due process claim was not complicated by an unresolved state-law question, even though the plaintiffs might have sought relief under a similar provision of the state constitution."); 17 C. Wright, A. Miller & E. Cooper, *supra*, § 4242, at 462-64; Field, *Abstention in Constitutional Cases: The Scope of The Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1099-1100 n. 108 (1974); *Developments in the Law — Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1245-47 1977).

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Article II, Section 11 of the New Mexico Constitution provides that:

> Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.

We believe upon examination of New Mexico cases under this provision that the district court correctly concluded that the goals of N.M. Const. art. II, § 11 are the same as those served by the Establishment and Free Exercise Clauses of the First Amendment. The New Mexico courts have discussed the First Amendment and N.M. Const. art. II, § 11 together[5] and have cited federal case law under the First Amendment to support their findings

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We therefore cannot say that the district court abused its discretion by refusing to abstain in order to permit the New Mexico courts to determine whether the Bernalillo County Seal violates N.M. Const. art. II, § 11. *See Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 31 (10th Cir.) (Challenge to monument with religious and nonreligious symbols on courthouse grounds involved a "basic First Amendment right, of which the federal court has jurisdiction, and, although a like provision of the state constitution is involved, proper resolution of the federal right is not conditioned upon resolution of any state question, law or constitution."), *cert. denied*, 414 U.S. 879 (1973).

[5] *See Zellers v. Huff*, 236 P.2d 949, 959-61 (N.M. 1951) (holding invalid under federal and state constitution, among other things, teachers' use of sectarian books and wearing of religious garb and crucifix in public schools).

under both the federal and state constitutional provisions.[6] We therefore hold, for the reasons stated in upholding the county seal under the Establishment and Free Exercise Clauses in *supra* Parts II and III, that the seal does not violate N.M. Const. art. II, § 11.

V

Conclusion

Accordingly, we conclude that the Bernalillo County seal does not violate either the Establishment or Free Exercise Clauses of the First Amendment or the Religion Clause of the New Mexico Constitution.

AFFIRMED.

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[6] *See State v. Vogenthaler*, 548 P. 2d 112, 113-14 (N.M. Ct. App. 1976) (discussing statute prohibiting church desecration); *see also Duffy v. Las Cruces Public Schools*, 557 F. Supp. 1013 (D. N.M. 1983) (New Mexico statute authorizing daily moment of silence in public schools held unconstitutional under Establishment Clause and under N.M. Const. art. II, § 11), *appeal dismissed*, No. 83-1358 (10th Cir. June 30, 1983).

[Photograph appears at App. 12a]

[Photograph appears at App. 13a]

No. 82-1064, FRIEDMAN v. BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY

LOGAN, Circuit Judge, dissenting:

After reading a description of the Bernalillo County seal and considering its early use on city documents, I was prepared to find no constitutional violation in this case. My view changed, however, once I saw the overwhelming prominence of the cross on the seal and understood its current use. The cross appears as a strikingly Christian symbol in the context of the seal. Admittedly, the seal has historical connotations in New Mexico, and I have no objection to some government attempts to acknowledge our religious heritage. *See Lynch v. Donnelly*, 52 U.S.L.W. 4317, 4319 (U.S. March 5, 1984). Yet, I do not believe the historical connotations of the items depicted render the use of this seal constitutional.

If the Latin cross on the seal were featured no more prominently than the mountains, the sheep, or the green plain, perhaps this case would be more like the creche in the Christmas display approved in *Lynch*. But this is not like a creche erected during the holiday season as a part of a display that also contains a Santa Claus house, reindeer, a Christmas tree, and a sleigh. *See id.*, 52 U.S.L.W. at 4318. Here the cross, the religious element of the seal, occupies half the seal, is highlighted by a blaze of light emanating from its center, and is accompanied by a motto that may be regarded as promoting the religious faith the cross itself represents. Moreover, the cross stands above a flock of sheep, an undeniable element of Christian iconography. Thus, despite the fact that Bernalillo County was, and perhaps is, a major sheep raising county, the

Christian symbolism of Jesus as the shepherd of the Christian flock or the lamb of God is apparent from this seal. The seal is emblazoned approximately two feet high on the doors of all county vehicles and also appears as a shoulder patch on county law enforcement officials' uniforms.

The Court in *Lynch* focused on the creche's use in the context of the Christmas season, stating that to "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Id.* at 4320. In Bernalillo County there is no seasonal aspect to the use of the seal. The County's use of the seal also serves no underlying commercial purpose.

I recognize that the Supreme Court in *Lynch* rejected strict application of any test to Establishment Clause cases, stating that no per se Establishment Clause rule could be drawn. *Id.* at 4320. Nevertheless, the Court applied the analysis of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine that the city of Pawtucket, Rhode Island, had a secular purpose for including a creche in a seasonal display, that the city's use of the creche did not have an impermissible religious effect, and that its use did not excessively entangle religion and state. *Id.* at 4321-22. The trial court here made a similar analysis and findings concerning the uses of the seal by Bernalillo County.

Heretofore, I have considered a trial court's findings on such issues to be mixed questions of law and fact for purposes of appellate review. But even accepting the majority's view that the clearly erroneous standard ap-

plies, I would reverse. Perhaps like Justice Potter Stewart and his famous comment on pornography, I cannot define an Establishment Clause violation in the abstract; I do, however, recognize a violation when I see it.

Applying the *Lemon v. Kurtzman* analysis to our case, I agree that the seal used to symbolize Bernalillo County has the secular purpose of identifying county vehicles and employees. But that is the rub; by identifying county employees, particularly police officers, by marking their vehicles with this seal and placing the seal on their shoulder patches as badges of authority, the principal or primary effect is to advance some religious beliefs and, I believe, excessively entangle the county with a particular religion.

If I were approached by officers leaving a patrol car emblazoned with this seal containing a prominent Latin cross, and whose uniform shoulder patches displayed this same seal, the impression conveyed to me would be that these officers were Christian police, and that the organization they represented identified itself with the Christian God. If I were an identifiable follower of any non-Christian religion, I would question those officers' ability and desire to provide me with even-handed treatment. If I were a local citizen with no strong religious conviction, I would assume that my county had given the Christian religion its imprimatur and surmise that I might benefit in secular ways by identifying myself with that religion. As the Court stated in *School District of Abington Township v. Schempp*, 374 U.S. 203, 221 (1963) (quoting *Engle v. Vitale*, 370 U.S. 421, 430-31 (1962)), "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive

pressure upon religious minorities to conform to the prevailing officially approved religion is plain." Here, although direct financial support is not provided to any religious sect, there can be little doubt that the power and prestige of the county has been placed behind the Christian faith.

When used in the same way as a notary seal on documents the Bernalillo County emblem is innocuous; used as a seal two feet in diameter on the side of all police vehicles and as a shoulder patch on police officers' uniforms it is not innocuous. Backed by the power and prestige of the Bernalillo County sheriff's department, it has a religious effect that violates the Establishment Clause of the First Amendment.

Therefore, I would reverse, holding that this seal, as it is used, violates the Establishment Clause.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 80-852-JB

HERALD JAMES JOHNSON and AL FRIEDMAN,

Plaintiffs,

v.

BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, DAVID SANTILLANES, Chairman, JUVEN SANCHEZ, ROBERT HAWK, WRAY SIMMONS, E. R. (CORKY) MORRIS, Members,

Defendants.

December 21, 1981

MEMORANDUM DECISION AND ORDER

THIS is a civil action in which Plaintiffs seek a declaratory judgment and an injunction to prevent Defendant Board of County Commissioners of Bernalillo County from displaying and appropriating public funds for the display of the Bernalillo County official seal. It is their contention that the official seal constitutes an instrument propagating religion and a particular religion, to wit: Christianity; that the use of the seal constitutes an establishment of religion and an interference with the free exercise of religion, in violation of the First Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment. This practice is also

claimed to be violative of Article II, Section 11, of the New Mexico Constitution.

The action is brought pursuant to 42 U.S.C. § 1983. Jurisdiction is based upon 28 U.S.C. § 1343(3) and (4) and 28 U.S.C. § 2201 and §2202. The jurisdiction of the state-law issue is also properly before the Court. *United Mineworkers v. Gibbs*, 383 U.S. 715 (1966).

Although Defendant initially contested the standing of Plaintiffs to bring this action, it has apparently conceded standing in its requested findings of fact and conclusions of law. Nonetheless, it is appropriate to state that Plaintiffs have standing as they have asserted a litigable interest under the Establishment Clause and the Freedom of Exercise Clause of the First Amendment. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973).

It is important—indeed essential—that our citizens stand ever vigilant to insure complete governmental neutrality in religious matters. In undertaking this high mission, however, one must attempt to avoid being a slave to his own perceptions since, too often, personal interest becomes the standard of one's belief as well as of one's practice.

The Bernalillo County seal which is the subject of this action is a circle around the edge of which appear the words: "County Commissioners—Bernalillo County, New Mexico." Within an inner circle, the words "CON ESTA VENCEMOS" stand against a background depicting the sky. Below these words is a cross centered over four blue mountains. Beneath the mountains is a green plain against which eight sheep are imposed. The origin

of the seal is unclear but it is uncontradicted that it has been in official use by the County since at least 1925. The seal appears on all official County documents and County stationery and is displayed on County property such as County motor vehicles and on shoulder patches of the members of the Bernalillo County Sheriff's Department. As part of their relief, Plaintiffs seek the removal of the cross and the motto "CON ESTA VENCEMOS" from the seal.

The First Amendment clearly states that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. This portion of the First Amendment typically is referred to as the Establishment and Freedom of Exercise Clauses. The Court will discuss these clauses separately. Before doing so, however, there are certain legal precepts that are firmly established in First Amendment jurisprudence which dictate the Court's decision.

In the panorama of First Amendment decisions, one caveat remains outstanding: that the history of man is inseparable from history of religion. *Engel v. Vitale*, 370 U.S. 421 (1962). And, while acknowledging this tenet, the Court is not blinded to the fact that the pages of history of the Southwest record dark deeds committed under the aegis of religion.

Although the Establishment Clause and the Free Exercise Clause may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause prohibits the fusion of government and religious functions or a concert or a dependency of one upon the other. *School*

District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963). The Free Exercise Clause recognizes the right of every person to freely choose his own course in the pursuit of belief in a religion totally free of compulsion from the government. It also recognizes the right of non-belief. *Abington v. Schempp, supra.*

Before discussing these clauses, it is appropriate, to give heed to Mr. Justice Goldberg's announcements in *Abington v. Schempp, supra*, at page 306 where he stated:

> Neither government nor this court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our own legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require it to do so.

Equally illuminating is the opinion of Mr. Justice Jackson in *McCollum v. Board of Education*, 333 U.S. 203, 235-236 (1948), wherein he stated:

> I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples.

Of the two Plaintiffs only Plaintiff Friedman appeared at the hearing. He identified himself as a social worker, a resident of Bernalillo County, and described himself as an "atheist" and an "ethnic Jew." According to

Mr. Friedman, the cross on the seal was anathematical to him and had an inhibitory effect upon him. He also perceived the sheep in the seal as part of the Christian symbolism of the seal.

Rabbi Citrin, the rabbi of Temple Albert, a congregation of approximately 400 people, spoke for Plaintiffs as did Mr. Gerald Goodman. Although he could not speak for his congregation, Rabbi Citrin said he personally viewed the cross as a "theological statement." He admitted, however, that the cross did not inhibit him in the practice or the propagation of his faith. Mr. Goodman, a Bernalillo County Commissioner from 1964 to 1966, found the statement "con esta vencemos" to be a militant statement but, as far as he was concerned, presented "no problem."

County Manager Alex Abeyta, Jr., testifying for the Defendant, stated that State law required a seal and that the seal was used on the County motor vehicles for identification purposes. This use also was echoed by another defense witness, County Commissioner Wray Simmons who described the cross as a Latin cross having only historical significance. Commissioner Morris, a Bernalillo County Commissioner since 1972, also stated that the seal was used to give identification to the County. Past Commissioner, Mr. L. A. "Skeet" McCulloch, Jr., saw the seal as a "historical, geographical and topographical display."[1]

Mr. Byron A. Johnson, the curator of history of the Albuquerque Museum, Albuquerque, New Mexico appeared

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1. When asked what the sheep on the pastoral background represented, Commissioner McCulloch humorously stated that he did not know but that according to some of the County Commissioners during his tenure, the sheep represented the voters to be fleeced.

as an expert for Defendant. He recited the historical precedence for all of the symbols displayed in the County seal. He translated the motto on the seal, "con esta vencemos," as "with this we conquer." It should be noted here that the expert witness for Plaintiffs, Dr. Raymond MacCurdy, a professor at the University of New Mexico, similarly translated the words but added that they also could be translated as "with this we overcome" or, simply, "with this we win."

Mr. Johnson found the seal representative of the history and culture of Bernalillo County. He stated that the green background with the sheep imposed had a historical reference to sheep raising in the Bernalillo County in the mid-1800's when Bernalillo County had the oldest and most intensive sheep raising industry in the United States.[2] Mr. Johnson asserted that the first incursion into the New Mexico territory by Europeans was made in 1539 by a Catholic Friar, Marcos de Niza, who explored New Mexico including the Bernalillo County area. The entry of Francisco Vasquez Coronado followed. Coronado's party included two priests, Friars Escalante and Padilla who remained in Bernalillo County and were later killed by

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2. The importance of the sheep industry in Bernalillo County is supported by the Department of Agriculture's *Special Report on the History and Present Conditions of the Sheep Industry* of the United States published by the Government Printing Office in 1892. It reports that sheep were brought into the territory by the Spanish in 1680. In 1890, the count of sheep in Bernalillo County numbered 800,000 and the wool product handled in that time amounted to approximately two million pounds. The Report also points out that there was a total of 38,640,446 acres of irrigable agricultural and grazing lands. Of these lands, the majority were situated in the Rio Abajo which encompassed all of the present Bernalillo County. *Id.* at 914-930.

hostile pueblo Indians. In 1581, Fray Augustine Rodriguez and two assistant clerics, Friars Lopez and Santa Maria, entered in search of Escalante and Padilla and met the same fate. Finally, with the Onate expedition of 1598, farming became the principle activity in the Bernalillo County area and missions were built at Sandia Pueblo in 1610 and at Isleta Pueblo in 1612. Once permanent settlements were established, the Catholic missionaries played a singular role in keeping the Spanish colonists physically and spiritually alive.

Mr. Johnson further testified that Catholicism was then the State church; that the church could not be separated from New Mexico history; that, indeed, the church was totally integrated in the heritage of New Mexico and of Bernalillo County. He saw the cross in the seal as symbolic of the long history of Catholic exploration, the church's missionary endeavors, and of the church's impact on early Hispanic life in the region.

Dr. Charles Polzer, a Jesuit priest and ethno-historian from the University of Arizona, agreed that sheep raising was the primary industry in colonial Bernalillo County. In his view, the sheep in the seal could not be a religious symbol since such a symbol typically requires a "life-form" which does not appear in the seal. He stated that Christianity played a significant part in southwestern history. He also viewed the cross in the seal not as a religious symbol but as an historic symbol of the Christian and Spanish heritage of New Mexico.

Mr. Henry Beckwith, an expert in heraldry, also spoke for Defendant. He described the cross in the seal as a "botonee" cross, a term of heraldry, referring to the three

buttons at the end of each arm of the cross. Mr. Beckwith described the cross as "victorian decadent," and identified the seal as an heraldic composition. He found the seal to be symbolic of the Spanish heritage of New Mexico and the sheep raising industry of the region.

The origin of the cross, as we presently know it, is hidden in the mists of time. Gibbon reports that the principal standard which displayed the cross was the *Labarum.*[3] He describes it as a long pike intersected by a transversal beam. He also notes that the ecclesiastic writters have found the figure or likeness of a cross in almost every object of nature or art; in the intersection of the meridian and equator, the human face, a bird flying, a man swimming, a mast and yard and a plow.[4]

The cross initially was an instrument of torture with which the ideas of guilt, pain and ignominy were closely united.[5] This form of punishment was abolished by Constantine and it is reported that the emperor erected his own statue in the midst of Rome, following his conquests, bearing a cross in his right hand with an inscription which referred to the victory of his arms in the deliverance of Rome.[6] Some ecclesiastic writers report that in the night which preceded the last battle against Maxentius, Constantine was admonished in a dream to inscribe the shields of his soldiers with the "celestial sign of God"; that he

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3. 1 E. Gibbon, *The Decline and Fall of the Roman Empire* 645 (1931).

4. *Id.* at 644 n. 29.

5. *Id.*

6. *Id.* at 644 n. 31.

executed the command and was rewarded by the decisive victory of the Milvian Bridge.[7] As to this, Gibbon questions the credulity of the reporter and concedes the tacit approbation of Constantine himself. It is also reported that on one of the marches of Constantine, he personally observed the sign of the cross above the meridian sun and inscribed with the words "by this conquer."[8] Christ then appeared before his eyes displaying the same celestial sign of the cross and directed Constantine to frame a similar standard for an assured victory over Maxentius.[9]

If these writers are to be believed, it would seem that as early as 312 A.D., a cross and motto, similar to the cross and motto in the Bernalillo County seal, were perceived, or conceived, for dubious pious purposes.

Establishment Clause

In cases dealing with the Establishment Clause, the Supreme Court has announced a three-part test for determining whether government activity is permissible:

> First, the [action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [action] must not foster "an excessive government entanglement with religion."

Stone v. Graham, 449 U.S. 39, 40 (1980); *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 Sup. Ct. 2105, 2111, 29 L.Ed. 2d 745 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 761 (1973); *Lanner v. Wimmer*, Nos. 79-1520 &

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7. *Id.* 646.
8. *Id.* 649.
9. *Id.*

79-1525, slip op. at 5 (10th Cir. Oct. 13, 1981). In applying the test, it must be recognized that total separation is not possible in the absolute sense since some relationship between government and religion is recognized. *Lemon v. Kurtzman, supra.* Indeed, religious values pervade the very fabric of our national life. *Lemon v. Kurtzman, supra* at 623.

Purpose

Examining the Bernalillo County seal under the first element of the test, the Court finds that a secular legislative purpose is served. And in so finding, the Court acknowledges that the cross has a religious significance. The Court would be disingenuous to do otherwise. The Court would be correspondingly disingenuous to deny that Catholicism was the preeminent religion in the early days of this territory. Catholicism cannot be separated from New Mexico history. Catholicism is as much of New Mexico history as the conquistadores who explored this area and named the State capitol "Santa Fe," which translated means "the City of the Holy Faith," and named our beautiful mountain range "Sangre de Cristo," which translated means "the blood of Christ."

The Court finds persuasive the testimony of Mr. Johnson and Dr. Polzer that the cross in the seal represents the Spanish and Catholic traditions of early New Mexico and of Bernalillo County. And, based upon the history of the sheep raising industry about which comment has already been made, the Court finds that the sheep depicted on the seal are symbolic of that industry.

The Court finds that the purpose of the Bernalillo County seal, in its present form, is to authenticate official

documents, authenticate official communications, and to facilitate identification of County property and personnel of the County Sheriff's office. Simultaneously, it is used to promote the appreciation of the heritage, history and cultural pride of Bernalillo County.

Effect

In addressing the issue of whether the cross and motto on the Bernalillo County seal have a principal or primary effect that advances or inhibits religion, the Court again must view the seal against the historical panorama.

The Court acknowledges that the government may depict objects with a spiritual content, but it may not promote or give its stamp of approval to such spiritual content. *Stone v. Graham*, 449 U.S. 39 (1980); *Allen v. Hickle, supra.* The First Amendment does not require that the prerogatives of government be limited by the sensibilities of its most sensitive or fastidious citizens. *Citizens Concerned for Separation of Church and State v. The City and County of Denver*, Civil Action No. 80-DW-1661 (D. Colo., Dec. 4, 1981). And individual sensitivities or preferences are not the constitutional standard. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Although the cross and the motto may have some religious significance to Mr. Friedman, or some other sensitive perceiver, the Court views the cross and the motto on the seal as having only a benign reference to religion and having no principal or primary effect that advances or inhibits religion. The Court views the seal as an iconographic illustration of the rich cultural heritage of Bernalillo County.

Entanglement

Excessive government entanglement is perhaps most simply defined as an impermissible merging or intermeddling of the proper spheres of religion and government. *American Civil Liberties v. Rabun City Chamber of Commerce*, 510 F. Supp. 886 (N.D. Ga. 1981). In the typical parochial aid case, the Supreme Court examines four factors to determine whether government entanglement with religion is excessive. These elements are: (1) the character and purposes of the institutions that are benefitted, (2) the nature of the aid the government provides, (3) the resulting relationship between the government and the religious authority, and (4) the devisive political potential of the aid. *Lemon v. Kurtzman, supra.* While this test cannot be precisely applied to the instant case, it does provide the Court some direction.

Although Mr. Lawrence Sanchez, the Director of Finance for Bernalillo County, testified that no funds were allocated to the display of the seal, it cannot be gainsaid that some cost must be attributable to the display of the seal and, therefore, to the display of the cross and motto. No evidence was offered by the Plaintiffs, however, to give the Court direction as to what amount of County funds are allocable to the display of the motto and cross. But the funds that Bernalillo County provides for the display of the motto and the cross, in the Court's view, are minimal. Moreover, the Court perceives no benefit to be gained by any religious group by the display of the cross and the motto. Similarly, the Court finds no relationship between the County and any religious authority in the display of the cross and the motto on the seal. And it would require a singular subtlety of mind to ideate a devisive

potential among the County and any religious or non-religious groups by the display of the cross and the motto.

Free Exercise Clause

As stated earlier, Mr. Friedman characterized himself as an athiest and as an ethnic Jew. He did not articulate, however, how the symbolism of the cross and the motto, as perceived by him, affected his right to believe or not to believe in a deity or how it affected his ethnicity. And, as stated earlier, individual preferences, as sincere as they may be, cannot be the constitutional standard.

Under the Establishment Clause and the Free Exercise Clause, the Court finds that the Bernalillo County seal passes Constitutional muster. In this Court's view, the seal is more of a historical symbol than a religious expression. Therefore, it would be palatably unreasonable to require the removal of the passive and benign symbols of the cross and the motto from the seal.

The foregoing shall constitute the Court's findings of fact and conclusions of law.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs take nothing by their complaint against Defendant and that each party bear their own costs.

DATED this 21st day of December, 1981.

/s/ Juan G. Burciaga
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVEMBER TERM—December 26, 1985

Before Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, and Honorable John P. Moore, Circuit Judges

AL FRIEDMAN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, DAVID SANTILLANES, Chairman, JUVEN SANCHEZ, ROBERT HAWK, WRAY SIMMONS, E. R. (CORKY) MORRIS, Members,	)	JUDGMENT
	)	No. 82-1064
	)	(D.C. No. 80-0852-B)
Defendants-Appellees,	)	
	)	
AMERICAN JEWISH CONGRESS and THE RUTHERFORD INSTITUTE,	)	
	)	
Amici Curiae.	)	

This cause came on to be heard on the record on appeal from the United States District for the District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remand-

ed to the United States District Court for the District of New Mexico for further proceedings in accordance with the opinion of this court.

/s/ Howard K. Phillips, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(March 4, 1986)

HERALD JAMES JOHNSON and
AL FRIEDMAN,

Plaintiffs,

v.

BOARD OF COUNTY
COMMISSIONERS OF
BERNALILLO COUNTY, DAVID
SANTILLANES, Chairman, JUVEN
SANCHEZ, ROBERT HAWK,
WRAY SIMMONS, E.R. (CORKY)
MORRIS, Members,

No. CIV-80-0852-JB

Defendants.

ORDER

The United States Court of Appeals for the Tenth Circuit's having reversed this Court, ruling that the Bernalillo County seal is violative of the Establishment Clause of the First Amendment to the United States Constitution in its depiction of the cross and the motto "Con Esta Vencemos," and having remanded the cause to this Court for further proceedings in accordance with its opinion:

IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants discontinue the use of the Bernalillo County seal in its present form, depicting the cross and the motto "Con Esta Vencemos."

DATED this 4th day of March, 1986.

/s/ Juan G. Burciaga
United States District Judge